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Supreme Court of the United States

OCTOBER TERM 1972

No. 73-77

MITCHELL ROTHBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL H. METZGER
Attorney for Petitioner
2185 Union Street
San Francisco, California 94123
(415) 563-2520

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Mitchell Rothberg, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 8, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to this brief. The opinion of the District Court is reported 351, F.S. 1115 (EDNY 1972), and is reproduced in Appendix B to this brief.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 8, 1973. This petition for certiorari is filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Where the government charged the petitioner with possessing *Cannabis Sativa* L. under 21 U.S.C. 176(a) and 26 U.S.C. 4671 was the petitioner denied due process of law by the refusal of the courts to permit him to prove to a jury, with scientific evidence, that he did not possess *Cannabis Sativa* L?

2. Where the statute proscribing transactions in *Cannabis Sativa L.* is clear on its face, can the courts judicially amend the clear meaning of the statutory words to include other species of cannabis (*cannabis indica* Lam. or *Cannabis Ruderalis* Jan.) not mentioned in the statute?

3. Where the proscribed substance, *Cannabis Sativa* L., has a clear and precise scientific meaning, may the courts read the words in a non-scientific way to include substances defined differently by science?

4. Where two congressional statutes exist, one dealing with *Cannabis Sativa* L. and another with *Cannabis Indica* Lam. (21 U.S.C. 209), may the petitioner who is charged with possessing *Cannabis Sativa* L. be prevented, consistent with due process, from showing to a jury for its factual determination that the substance he possessed was *Cannabis Indica* Lam. or another

species not covered by any statute, *Cannabis Ruderalis* Jan.

5. Where the petitioner is charged with possessing *Cannabis Sativa* L. must the government show as a matter of fact and beyond a reasonable doubt that the petitioner did possess that substance and can the courts prevent the petitioner from showing by scientific evidence that the government cannot meet its burden of proof?

Statement of the Case

On February 16, 1971, Mitchell Rothberg was indicted in the United States District Court for the Eastern District of New York for violations of 21 U.S.C. 176(a), prohibiting transactions in *Cannabis Sativa* L.

Prior to trial a hearing was held to determine the admissibility of petitioner's offer of scientific proof regarding the substance which petitioner was charged with possessing, petitioner contending that he did not possess *Cannabis Sativa* L.

On November 17, 1972, after the court orally denied the petitioner the right to submit his evidence to a factual determination by the jury, the petitioner agreed to enter a plea of guilty to count two of the indictment and the government, with the approval of the court, filed a written consent to appeal the issues raised at the pre-trial hearing pursuant to the procedures outlined in *United States v. Mann*, 451 F.2d 346 (2d Cir. 1971).

On November 30, 1972, Honorable John R. Bartels, United States District Judge, filed an order upon which the appeal was taken.

On January 26, 1973, petitioner Mitchell Rothberg was sentenced to the custody of the attorney general for a mandatory minimum period of five years in jail.

On June 8, 1973 the Court of Appeals for the Second Circuit affirmed the judgment.

Statement of Facts

On February 16, 1971 Petitioner, MITCHELL ROTHBERG, was indicted and charged with violation of 21 U.S.C. 176(a)[1] which, by incorporating the definition of 26 U.S.C. 4761, prohibits possession or distribution of *Cannabis Sativa* L.

On November 13, 1972, the case was called for jury trial before Hon. John R. Bartels in the United States District Court for the Eastern District of New York.

Prior to the impaneling of a jury, Petitioner's counsel informed the Court that the principal defense which would be raised during the trial was whether or not the material Petitioner was alleged to have possessed was the specific material described and prohibited by the statute. The Court was informed that Petitioner intended to bring evidence before the jury to establish that the Government could not prove that the material possessed by Petitioner was *Cannabis Sativa* L. Indeed, Petitioner indicated that he intended to introduce evidence before the jury which would not only show a *failure* of proof

1. This section, repealed in May 1971, prohibited various transactions concerning marijuana illegally imported into the United States.

on the part of the government, but would affirmatively establish that the material he possessed was not *Cannabis Sativa* L. Rather, the petitioner would prove that the substance he possessed was *Cannabis Indica* Lam., a substance mentioned in an entirely different statute (21 U.S.C. 209). The court was informed that such evidence would come before the jury in the form of expert testimony from various chemists and botanists, (A-17)*.

Counsel indicated to the Court that discussions concerning this defense had taken place between counsel for Petitioner and counsel for the Government, and that it was the opinion of both parties that certain preliminary questions concerning the *admissibility* of evidence should be resolved by the Court prior to the impaneling of a jury.

For the reasons stated above, the defense and prosecution requested a special pre-trial hearing, the *sole purpose* of which was to determine whether or not the Court would admit the testimony of expert witnesses in support of the scientific defense alluded to above.

Simply stated, Petitioner's position was that the prosecution must prove, in order to obtain a conviction under 21 U.S.C. 176(a) (now repealed) that Petitioner possessed the *specific* substance prohibited by the statute, i.e., *Cannabis Sativa* L. Petitioner further contended that he did not possess *Cannabis Sativa* L. and would prove this to the satisfaction of a jury.

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*The letter "A" as used herein refers to the Appendix filed on behalf of MITCHELL ROTHBERG in the United States Court of Appeals for the Second Circuit.

Since the matter involved certain scientific expressions and since the Government indicated that it did not agree with Petitioner's view of the statute, various evidence was adduced, pre-trial, to acquaint the Court with the issue.

The first point (uncontested) was that the expression *Cannabis Sativa* L. is a scientific expression and is the botanical description of a particular plant. In Zoology and Botany there exists an area of specialty known as taxonomy, that is to say; *classification* and *nomenclature* (of plants or animals). In Botany, a plant is classified on a hierarchal order starting with its Class, Family, etc. and working down to its Genus and Species. Thus every plant is *always* botanically described by its Genus and Species[1]. The same is true in Zoology where, for example, *Felis Leo* is the zoological name of the Genus and Species of the lion, whereas *Felis Domesticus* is the Genus and Species of the common house-cat. There is absolutely no dispute now, nor was there any before Judge Bartels, that the expression "*Cannabis Sativa* L." refers to a particular plant. The word "Cannabis" refers to that plant's *Genus* and the word "Sativa" refers to its *Species.*

Petitioner advised the Court that since the statute specifically designated the prohibited substance by *both its Genus and Species* it was incumbent upon the Government to establish that Petitioner trafficked in plant material of *that Genus and Species.* Moreover, Petitioner offered to prove that the Genus

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1. Most Genera of plants and animals have multiple Species. For example, the Family Cannabaceae has two Genera; Cannabis and Humulus (hops). The Genus Humulus has at least two recognized Species; Japonicus and Lupulus.

Cannabis was polytypic (having more than one Species) and that the material in question was *not* of the Species *Sativa.*

In order to make the nature of the proposed defense clear, Petitioner introduced into evidence Exhibits "A" and "B" – the transcribed testimony of Dr. Richard Evans Schultes, Professor of Botany at Harvard University and Curator of the Harvard Botanical Museum. This testimony contained in Appellant's Appendix (pages 34 through 257) was taken under oath in *another* Federal District Court proceeding.[1] Exhibits "A" and "B" were admitted into evidence as "an offer of proof", (A-27).

Although the proceedings would have been terminated with the introduction of Dr. Schultes' former testimony, the Court indicated a desire to probe the question further, and various other experts gave testimony (see Opinion of Judge Bartels, A-265-274).

In addition to receiving the September 1972 testimony of Dr. Schultes, the Court heard testimony from Dr. William Klein, Jr., Assistant Director of the Missouri Botanical Gardens, Dr. Ernest Small, a botanical taxonomist associated with the Canadian Department of Agriculture, and Dr. Arthur Cronquist, Director of Botany of the New York Botanical Gardens. Dr. Schultes also took the stand to re-affirm the testimony that he had given in the *Honeyman* case.

All of the experts agreed that the expression *Cannabis Sativa* L. stood for the Genus Cannabis and the Species Sativa. The

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1. *United States v. Eric Honeyman, et al.*, No. 71-1035 N.D. Cal.

only disagreement between the experts related solely to the question of whether or not there exists *more than one species* of Cannabis. Drs. Schultes and Klein contended that there exists at least *three* separate species of Cannabis (Sativa, Indica and Ruderalis), whereas Drs. Small and Cronquist maintained that it was their opinion that the genus is monotypic (having one species only). It was precisely this issue which Petitioner wished to bring before the jury and it was this issue which the Court ruled could not be tried before a jury.

On November 16, 1972, at the conclusion of the pre-trial hearing, the Court, while agreeing that the "statute is clear and unambiguous", concluded that there was only one species of Cannabis and that species was Cannabis Sativa (A-259-264).

This first ruling of Judge Bartels, which preceded his written opinion, was clearly erroneous. The issue before him was not to determine, *as a matter of fact*, whether the Genus Cannabis was monotypic or polotypic. (See A-263-4) The only issue presented to the District Court was whether Petitioner would be permitted to adduce evidence on this question during the trial. The Court ruled that Petitioner could not.

Having been told by the Court that he would not be permitted to present evidence concerning whether or not the material seized by the police met the statutory definition, Petitioner entered into a "plea bargain" and on the following day, November 17, 1972, Petitioner entered a plea of guilty to Count Two of the Indictment with the express understanding that the issue could be preserved for Appeal, (See A-282-3).

Thereafter, on November 30, 1972, Judge Bartels filed a written opinion on the scientific question. Said opinion is

contained in Appendix "B" of this brief, and is officially reported in *U.S. v. Rothberg*, 351 F.Supp. 1115 (E.D.N.Y., 1972).

Judge Bartels' written opinion differed materially from the oral ruling rendered on November 16th in that he no longer "concluded" that there was only one species of Cannabis, a question the Court apparently conceded would be for the *jury* and not the Court, if the issue itself constituted a valid defense. In Judge Bartels' written opinion he excluded Petitioner's offers of proof on the ground that evidence concerning whether or not the Genus Cannabis had one or more species was immaterial as a matter of law. The Court, although finding no ambiguity in the statute, resorted to "legislative history" and "construed" the expression *Cannabis Sativa* L. to include all other species of cannabis that might exist. It is from this ruling that Petitioner appealed pursuant to the written Consent to Appeal, (A-282, 3).

Summary of Argument

Judge Bartels acknowledged – in his own words – "the statute is clear and unambiguous" (A-262-3). In excluding the proposed defense testimony, the Judge stated that he had reviewed "legislative history" simply to see what the expression *Cannabis Sativa* "meant" (A-271-2).

Petitioner contends that the Judge's action was error. For the evidence before the Court was unanimously in agreement that the expression *"Cannabis Sativa* L." means a plant of the Genus *Cannabis* and the Species *Sativa*. The *meaning* of the words were *never in dispute!* The only dispute, which Petitioner contends was a factual matter for the *jury* to determine, was

whether or not there are one or more Species of *Cannabis*. For if there is only one species then *any Cannabis* matter would, of necessity, be of the Species *Sativa* whereas, if the Genus *Cannabis* is, as Petitioner is prepared to prove, polytypic, then there exists the possibility (and in this case almost the certainty) that the Species involved was *Cannabis non-sativa*, and, therefore, did not come within the coverage of the statute.

In excluding the proposed defense testimony, Judge Bartels actually enlarged the statute by speculating about Congressional motives and intent. An analysis of the District Court opinion indicates that the Judge reasoned as follows: (1) Congress intended to prohibit transactions involving *Cannabis*; (2) Testimony given to a Congressional Committee in 1937 seemed to indicate that there was only *one* recognized Species of *Cannabis*: [Sativa]. Therefore, (3) even if there is valid scientific evidence establishing the existence of other Species of *Cannabis*, these other Species *(Cannabis non-Sativa)* will be *deemed "Cannabis Sativa* L.", *as a matter of law*, because that would have been what Congress *would have done* if it had known about the existence of other Species.

The opinion of the Second Circuit put a different emphasis on the issue. The Circuit Court held that the petitioner had "fair notice" of what was prohibited because the meaning of the term *cannabis sativa* was understood by lawmakers, the general public and scientific opinion to be the only species of marijuana. The Court states further that since the experts offered by the defense reached their conclusions after the commission of the alleged crime their evidence is irrelevant. This analysis, however, is grossly inaccurate. In the first place, it is absurd to say that the *cannabis sativa* definition gave fair notice to all that all species of cannabis were included

under its ban, since 21 U.S.C. 209, which was on the statute books throughout the period in question, specifically refers to *cannabis indica*, and proscribes far more lenient penalties for transactions with that substance. Thus Congress itself made the distinction between species which Petitioner relied upon. If, as petitioner offered to prove, the substance he possessed was not *sativa*, but *indica*, or possibly *cannabis ruderalis* (not covered by any statute), then the petitioner, in the most favorable interpretation for the Government, was indicted under the wrong statute, and was not subject to the harsher penalties proscribed for possession of *sativa*. A jury could not convict the petitioner for possessing a substance banned by 28 U.S.C. 176(a) when he never possessed that substance, but possessed another substance treated under a different congressional statute. Furthermore, the date when the defense experts formed their opinions is totally besides the point. The issue is what did the petitioner possess, not when did an expert decide what it was he possessed.

By reading the ban on *cannabis sativa* to include all species of cannabis because Congress probably meant to include all species, both courts below violated basic principles of statutory construction. A statute which is clear and unambiguous is not the subject of judicial "interpretation" to vary the clear meaning of its words. In violating this fundamental rule, the courts below denied Petitioner's Constitutional right of Due Process and, moreover, the Courts' action was in violation of the Separation of Powers Doctrine.

REASONS FOR GRANTING THE WRIT

I

A STATUTE WHOSE LANGUAGE IS CLEAR AND UNEQUIVOCAL IS NOT SUBJECT TO JUDICIAL "CONSTRUCTION" THE EFFECT OF WHICH ALTERS THE CLEAR WORDING OF SUCH STATUTE.

The most fundamental principle of the law of statutory construction is that if a statute is plain, certain and free from ambiguity, the words of the statute control its ambit. Resort to extrinsic "guides", such as "legislative history" is prohibited, *U.S. v. Wiltberger* 5 Wheat. 76, 5 L.Ed. 37 (1820).

If the language of a statute is unambiguous, the statute must be accorded the expressed meaning without deviation since any departure would constitute an invasion of the province of the legislature by the judiciary, *Crawford, Construction of Statutes* (1940) at p. 249.

Statutory "interpretation" cannot be used to vary the clear meaning of the text of a statute. *Helvering v. City Farmers Bank*, 296 U.S. 85 (1935); *Fischer Flouring Mills Co. v. United States*, 270 F.2d 27 (9th Cir., 1958).

Title 21 U.S.C. 176(a), in pertinent part, reads as follows: "As used in this section the term 'marijuana' has the meaning given to such term by Section 4761 of the Internal Revenue Code of 1954."

Section 4761 of the Internal Revenue Code (Title 26) defines marijuana as ". . . all parts of the plant *Cannabis Sativa* L. . . .".

It is Petitioner's contention that no conviction may be had

under Section 176(a) unless the Government proves, as an essential element of its case, that the specific subject matter of the Indictment was "... the plant *Cannabis Sativa L....*". In other words, that the material which is the subject matter of the Indictment must, as a matter of law, meet the specific definitional requirements of the statute.

Section 4761 defines marijuana in a highly specific manner. The statute employs a scientific term based upon taxonomic botany (the nomenclature and classification of plants). The expression *"Cannabis"* relates to the Genus of a particular plant and the expression *"Sativa"* relates to a specific Species of that Genus, (A-44, 45).

Petitioner offered, and intended to prove to a jury, that there are *at least* three recognized Species of the Genus *Cannabis: Sativa L., Indica Lam.*, and *Ruderalis Jan.* (A-45). These are not geographic varieties. They are morphologically distinct in growth habit, form, seed articulation and other attributes. But they do share a number of similar characteristics which is to be expected by the fact that they are members of the same Genus *(Cannabis)*. Botanists, and more precisely, botanical taxonomists, have classified this Genus into two, if not three, distinct *Species*. Notable field botanists have upheld these decisions since the 18th Century, (A-48, 9).

For example, the classification of the Species *Cannabis Indica Lam.* (see 21 U.S.C. 209) was initially made by the well-known French scientist Jean-Baptiste Lamarck. Lamarck's acceptance of a second Species has been periodically confirmed by botanists over the last 200 years. (A-47).

Dr. Schultes, Professor of Botany at Harvard University and

Director of the Harvard Botanical Museum, is considered one of the world's foremost experts in taxonomic botany. Moreover, his special expertise is the classification of so-called "psychoactive" plants (such as *Cannabis).* Both Dr. Schultes and Dr. William Klein, Assistant Director of the Missouri Botanical Gardens, testified that they have made extensive herbarium studies in the United States, Europe and Asia and have examined *Cannabis* plants in their natural habitat in Afghanistan and in experimental sites in Mississippi. Drs. Schultes and Klein would have testified before the jury that they have determined, with *"scientific certitude"*, not only that *Cannabis* is polytypic (having more than one species) but, additionally, that *Cannabis* material coming from Afghanistan (the place of origin specifically alleged by the Government in this case) could *not* be *Cannabis Sativa,* but would be *Cannabis Indica* Lam. or *Cannabis Rudevalis* Jan.

The Trial Court, however, ruled that such evidence cannot constitute a defense *"as a matter of law"*. This ruling was based upon the Court's assumption that Congress "intended" to include all species of marijuana within the meaning of the expression *"Cannabis Sativa L."*

It is Petitioner's contention that such ruling was error. Section 176(a) (as defined by 26 U.S.C. 4761) specifically and unequivocally prohibits transactions involving *Cannabis Sativa* L. The definition of marijuana as *Cannabis Sativa* L. dates back to the Marijuana Tax Act of 1937 (26 U.S.C. 4741-4762). At about the same time that the Marijuana Tax Act was passed, a Narcotics Tax Act was passed (26 U.S.C. 4701-4736). It is interesting to note that as to narcotics the Congress made no attempt to use botanical definitions despite the fact that the two interdicted narcotics were of *plant origin;* to wit: *opium*

(and its derivatives) and *coca leaves* (and its derivatives). Thus, 26 U.S.C. 4731(a) defines a narcotic drug as, *inter alia*, opium and coca leaves. Rather than attempt to assign a scientific botanical classification to opium and coca leaves[1], the narcotic definitional statute adds as a catch-all: "any substance which is chemically identical" with opium or coca leaves.

On the other hand, with respect to marijuana, Congress elected to employ a specific scientific name, *Cannabis Sativa* L.

In 1954 both definitional statutes were re-enacted in the Internal Revenue Code of 1954. In 1956, when the Marijuana Import Act was enacted (21 U.S.C. 176(a), Congress again adopted, by reference, the original definition of marijuana and similarly maintained the same definition regarding narcotic imports. Thus, Congress has repeatedly adopted a definition for narcotics based upon *common names* such as "opium" and "coca leaves". With equal persistence, Congress has repeatedly adopted a specific *taxonomic* classification for marijuana. Thus Congress resolved all doubt about what substances were to be subsumed under the statute which precisely and technically described the outlawed plant by the Genus, *Cannabis*, and the

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1. Neither the word "opium" nor "coca" are scientific words. Botanically, opium comes from the Genus *Papaver* and Species *somniferum L [innaeus]* and coca leaves come from the Genus *Erythoxylon* and Species *coca Lam[arck]*.

Moreover, at the time that Congress elected to limit prohibited marijuana to *Cannabis Sativa*, there was, and continued throughout the time in question, *legislative recognition* of *Cannabis Indica* (21 U.S.C. 209).

Species, *Sativa L.*

Despite the precise definition of the statute,[1] the Court below ruled that Petitioner could not adduce evidence to prove that he did not possess *Cannabis Sativa* L.

The stated basis of the ruling was that the Trial Court "found" that the expression *Cannabis Sativa* L. did not "mean" what it said. Despite the *unanimous* expert testimony that the term refers to a *specific Species*, the Court ruled that the expression *Cannabis Sativa* L. was "meant" (by Congress in 1937) to include *Cannabis Indica* or any other Species of *Cannabis* (A-271-2).

The "finding" of the Trial Court was based on the *testimony* of three *witnesses* who appeared before the House Ways & Means Committee in 1937. The Court used this "legislative history" to determine "Legislative intent". In doing so, the Trial Court completely altered and interpolated the words of the statute. If upheld, the "statute" would now read: . . . *All parts of any plant of the Genus Cannabis and any Species thereof* . . .

Mr. Justice Frankfurter stated:

> "An omission at the time of enactment whether careless or calculated cannot be judicially supplied however much later wisdom may recommend the inclusion." Frankfurter, *Some Reflections on the Reading of Statutes* (1947) at 14.

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1. 26 U.S.C. 4761 – which the Trial Court admitted was "clear and unambiguous", (A 262-3).

There is overwhelming authority for this proposition.

Fischer Flouring Mills Co. v. United States, 270 F.2d 27 *supra*, for example, involved the question of whether the Fischer Co. could take advantage of the clear language of a tax statute to reap windfall benefits. The language of the statute called for payment of "3% tax of the amount paid in the United States for travel by rail." Fischer Co. made its payments in Canada for travel by rail in the United States inorder to avoid the tax. After paying (under protest) three 3 percent tax of the amount paid in Canada, Fischer sued for a refund on the ground that under the clear language of the statute it had not performed a taxable act. The Ninth Circuit agreed:

> "There is no room for interpretation or construction. The clear language of the enactment cannot be destroyed or abrogated because the judges think the results are improvident or impolitic. The courts have no such mandate." (at 30).

Although the intention of Congress may well have been to collect a tax on travel by rail in the United States, the words of the statute taxed only amounts paid in the United States. Thus, even though United States residents could flock to Canada to avoid payment of the tax, the Court was bound by the unequivocal language of the statute.

United States v. Iselin, 270 U.S. 245 (1926) is also illustrative. In *Iselin* the question was whether a federal tax should be imposed upon the sale by a "box owner", of a season's license to use her box at the opera. The Government conceded that no provision of the statute provided in terms for

taxing a privilege like that in this case, but argued that Congress clearly intended to tax all sales of theatre and opera tickets; that there was no indication of intent to exempt any sale of tickets or any resale at a profit; that this general purpose of Congress should be given effect so as to reach any case within the aim of the legislation; and that the statute should consequently be extended, by construction, to cover this case. The Court rejected the argument and held:

> "It may be assumed that Congress did not propose to exempt from taxation this class of tickets. But the Act contains no provisions referring to tickets of the character here involved; . . . The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, where specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." (Ibid. at 250)

The analogy is unmistakable. Section 176(a) was a statute drawn with carefully considered *taxonomic terms*. Congress could have chosen a more general definition as it did when dealing with opium. In defining narcotics, Congress declined to use a scientific botanical classification in favor of a general proscription of "opium" and "coca leaves" and "any substance which is chemically identical" with opium or coca leaves, 21 U.S.C. 174. Rather than using a broad definition with respect to marijuana, Congress used a narrow, technical definition.

Whether the omission of other Species of *Cannabis* was by design, by inadvertence, or ignorance matters not.

Whether Congress did not realize that *Cannabis* had other Species or whether it felt that other Species of *Cannabis* were not readily available in the United States and therefore not important enough to include is beside the point. Congress saw fit to mention only the *Sativa L.* Species and the Court is bound by clear definition of the statute.

In the instant case, the Courts below disregarded the plain words of the statute to carry out what it apparently felt to be an attractive policy, i.e., to "correct" a scientific expression by giving it a totally unscientific "meaning" in order to make it immune to attack. In *Van Camp v. American Can Co.*, 278 U.S. 245, the Supreme Court said:

> "In support of this contention [that plain words of a statute be disregarded in order to carry out attractive policy], we are asked to consider reports of congressional committees and other familiar aids to statutory construction. But the general rule that 'the province of construction lies wholly within the domain of *ambiguity*'....is too firmly established by the numerous decisions of this Court either to require *or permit* us to do so. *The words being clear, they are decisive. There is nothing to construe.*" (Ibid. at 253, emphasis added)

The Trial and Appellate Courts apparently felt that Congress would not have desired permitting a defense based upon evidence of the existence of a *non-Sativa* Species of *Cannabis*. But, as was stated in *U.S. v. Caldwell*, 463 F.2d 590 (3d. Cir. 1972):

"The process of statutory construction is akin to a journey on a narrow and sometimes obscure path. The language of the legislature provides the map to guide the way, but on occasion the chart seemingly leads in the wrong direction. In such cases, it is tempting for judges, in order to correct what appears to be the error, to supply either the meaning they deem appropriate, or the meaning they believe the legislature sought. Yet, our tripartite system of government requires that judges be pathfinders rather than trailblazers, and we must follow the course set for us even though it appears that the destination is not the one the legislature may have desired. The first of appellant's contentions does not present a difficult question of statutory construction. The words of the statute regarding the question of abatement are unequivocal. Appellant would have us limit the Act by interpreting it to read "Prosecutions initiated prior to the effective date for violations of law shall not be abated." However, to do so would require us, in effect, to redraft the Act in a manner inconsistent with its plain language. This we cannot do since the scope of the judicial function is to adjudicate, not legislate."

In sum, Judge Bartels, realizing that the statute was "clear and unambiguous", (A-263), first sought to make a *fact finding* by stating that "the Court has concluded that *Cannabis Sativa* L. is the same as *Cannabis Indica. . .*" (A-260). Apparently realizing that this *fact issue*—the number of Species of *Cannabis*—was a question for a *jury*, the trial judge, in his written opinion (filed 2 weeks later and *after* Petitioner pled guilty) studiously avoided any fact finding (findings Petitioner was entitled to have a jury decide) and based his ruling on construing the "meaning" of the critical words, stating that "Congress not only meant to, but actually did, include *Cannabis Indica* in using the term *Cannabis Sativa* L." (A-271).

Although Judge Bartels strongly denied that he was substituting his "interpretation or construction of a statute to vary the clear meaning of the words. . ." (A-271) that is precisely and exactly what he did. And the Second Circuit, in its opinion, committed the same error.

All four experts – Drs. Schultes, Klein, Small and Cronquist – *unanimously agreed* that *Cannabis means* a certain Genus and that *Sativa means* a certain Species. All four experts *unanimously agreed* that *if Cannabis Indica Lam.* was, *in fact*, a different Species, then such plant material would *not* be *Cannabis Sativa* L. All four experts *unanimously agreed* that if other species were found they also would not be *Cannabis Sativa* L. The *only* disagreement between the experts was one of *FACT!* Dr. Schultes and Klein maintained that there were at least *three* Species. Drs. Small and Cronquist recognized only one. This "Battle of Experts", as Judge Bartels correctly denominated it, (A-269) over questions of fact, are "battles" which every defendant is entitled to bring to a jury for determination, *U.S. Constitution, Amendment VI.*

The "meaning" of the expression is crystal clear. The Courts below did *exactly* what they said they should not do – they varied (materially!) the clear meaning of the words. And they did so by improperly utilizing so-called "legislative history"[1] to do so.

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1. We encase the words legislative history in quotes because the only "history" is the *testimony* of three *witnesses* taken in 1937 before the House Ways & Means Committee. There does not exist one single word on this subject in the "history", attributable to a legislator.

II

JUDICIAL ENLARGEMENT OF A CRIMINAL STATUTE VIOLATES DUE PROCESS

A person's right to reasonable notice of the ambit of a criminal statute and the opportunity to be heard in his defense – a right to his "day in court" – are basic in our system of jurisprudence.

The doctrine that criminal statutes must give fair notice of what action is criminal is Constitutionally mandated. A criminal statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Conally v. Geneva Construction Co.*, 269 U.S. 385. The "void for vagueness" doctrine, where criminal statutes are unclear, is a well settled aspect of the guarantee of Due Process of Law, *United States v. Harriss*, 347 U.S. 612; *United States v. Cardiff*, 344 U.S. 174 (1952).

In the instant case vagueness is *not* a problem. The Court did not rule that the definition, *Cannabis Sativa* L. is so broad that it must include other Species besides *Sativa;* the Court instead held that the definition is so narrow and precise that in spite of the clearness of the words, Congress could not have "meant" so restrictive a definition.

Bouie v. City of Columbia, 378 U.S. 347, is illuminating. There petitioners were convicted for criminal trespass under a

state statute which prohibited entry on private property where notice is posted prohibiting entry. Petitioners had entered a lunch counter where no such notices were placed. They were subsequently given notice that they were not permitted to enter nor to remain. They refused to leave, were arrested and later convicted of criminal trespass.

On appeal, the South Carolina Supreme Court, faced with a statute that only proscribed *entry* where there were signs posted prohibiting entry, reasoned that the statute could not have been meant to have such a narrow scope. The Court held that remaining on the property after notice was very much the same as entry *after notice* and within the general purpose of the statute.

The United States Supreme Court overturned the conviction on the single ground that judicial enlargement of a narrowly drawn criminal statute violates due process and is in the nature of an *ex post facto* law. Mr. Justice Brennan, writing for the majority, agreed that a judicial enlargement is distinguishable from cases involving vague statutes. He noted, however, that the thrust of the distinction is to produce a *"potentially greater deprivation"* of due process. He stated:

"When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute *as written* will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is

> required to 'speculate as to the meaning of penal statutes,' (citations) . . . the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> "There can be doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." (at 352, Emphasis supplied).

Thus, the Court held that to construe "entry" to include "remaining" did not give petitioners fair warning of what was criminal. This was true even though the particular defendants in the case testified that they expected to be arrested for, "[s]o far as the words of the statute were concerned," petitioners were given no "fair warning", *Id*, at 355. See also *Id*, at 355 f.n. 1.

To now construe Section 176(a) to include *Cannabis non-Sativa* would be to make criminal what the words of the statute did not before make criminal.

Criminal statutes "cannot be enlarged or extended by intendment, implication or by an equitable consideration . . . the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the [supposed] general purpose for which the statute was enacted.

Only those . . . *offenses* . . . clearly included *beyond any reasonable doubt* [may] be considered within the statute's operation . . . all questions will be resolved *in favor* of those from whom the penalty is sought", Crawford, *Statutory Construction, supra,* citing *U.S. v. McBoyle,* 283 U.S. 25, 51 S.Ct. 340 (1931). Technical terms must be given their technical meaning; the technical meaning is controlling, Sutherland, *Statutory Construction* (Horack ed. 1943, Vol. II at 424).

To smuggle, or have other transactions with marijuana within the meaning of 21 U.S.C. 176(a), one must have dealt with a plant of the Genus *Cannabis* and of the Species *Sativa* L.

Even assuming arguendo that Congress intended to include *Cannabis Non-Sativa,* the

> "courts of justice have nothing more to do with criminal statutes than to apply them to the cases to which the legislature has declared they shall be applied. If the legislature has accidently or inadvertently failed to express the intention that certain conduct shall constitute a crime . . . the court cannot correct the error or supply the omission no matter how plainly the conduct in question is within the mischief intended to be remedied." *State v. Trapp,* 73 So. 255 (Supreme Court of Louisiana 1916).

In the instant case, the words of the statute were technical, clear and precise. The District Court ignored the technical words and enlarged the coverage of the statute. The statute's "meaning" was "not revealed until the court's decision". Petitioner was denied his fundamental rights to Due Process.

Petitioner is entitled to rely on the specific notice given by

the statute and should have been allowed his "day in court" to prove his defense, *Bouie v. City of Columbia, supra.*

III

THE DISTRICT COURT'S RELIANCE ON "PRIOR ADJUDICATIONS" WAS WITHOUT MERIT OR JUSTIFICATION.

The District Court stated:

> "Accordingly, this court rejects the defendants' offer of proof and will exclude the introduction of any expert testimony before the jury concerning the mono- or polytypic nature of Cannabis Sativa L. This is wholly consistent with prior judicial adjudications." See *Leary v. United States,* 395 U.S. 6, 50, 89 S.Ct. 1532, 23 L.Ed. 2d 57 (1969); *United States v. Moore,* 330 F.Supp 684 (E.D.Pa. 1970), aff'd, 446 F.2d 448 (3d Cir. 1971); *United States v. Adams,* 293 F.Supp. 776 (S.D.N.Y. 1968).
>
> (351 F.Supp. at 1118, A-272)

The Court's reliance on the cited cases was misplaced.

The issue in *Leary,* with respect to 21 U.S.C. 176(a), related *exclusively* to the Constitutionality of the statute's *presumption* of illegal importation and knowledge. The question was whether possession of marijuana, *alone,* could support a presumption that the marijuana was illegally *imported* and that the possessor *knew* of such importation. Faced with substantial evidence that large amounts of marijuana are cultivated domestically, the Court concluded that the presumption was invalid.

Mr. Justice Harlan, writing for the Court, in reviewing current information about marijuana, listed and rejected, "five ways in which a possessor might acquire such knowledge [of importation]". Ibid at 47.

The fifth "possibility" was that a possessor might be able to tell the source of his marijuana from its appearance, packaging or taste. The Court noted "as for appearance, it seems that there is only one Species of marijuana, and that even experts are unable to tell by eye where a sample was grown". Ibid at 50.

This statement is footnoted (f.n. #106) to the testimony of Dr. Richard Schultes, Director, Harvard Botanical Museum in the case of *U.S. v. Adams*, 293 F.Supp. 776 (S.D.N.Y. 1968).

So that the matter may be clarified, Petitioner initially points out that both *Adams* and *Leary* dealt solely with the *presumption* aspect of Section 176(a). In neither case was the mono or polytypism of *Cannabis* remotely in issue. In both *Adams* and *Leary* the defendants challenged the statutory presumption of importation. Dr. Schultes was called as an expert in the (1968) *Adams* case and testified that large amounts of *Cannabis* grew in the United States and it was therefore quite possible for a given sample to be domestic.

During the course of his testimony he gave his (then) opinion that *Cannabis* was monotypic. This aspect of his testimony was completely irrelevant to the issue and was obviously made, *en passant*, as academic *dicta*. The issue in *Adams* (a District Court predecessor of *Leary)* had nothing whatever to do with how

many *Species* there are of the Genus *Cannabis*. Dr. Schultes was called, as a Botanical expert, to refute the basis for the presumption that most marijuana came from abroad. The District Court in *Adams* agreed, holding the presumption invalid.

When the same issue was presented to the Supreme Court in *Leary*, Mr. Justice Harlan approved the *Adams* ruling. In doing so he adopted, by reference, the *Adams* finding that *appearance* would not give a possessor knowledge of the source of a particular sample of *Cannabis*. The reference, however, included the irrelevant (to *that* issue) *dicta* concerning the number of species of *Cannabis* — a question which had absolutely nothing to do with the issue before either Court.

Moreover, Dr. Schultes freely admitted that his offhand remarks about the mono or polytypism of *Cannabis* have been completely revised since his appearance in the *Adams* case in 1968 (A-133-4, 215). See especially (RT 78-9, November 1972 proceedings).

In any event, the fact remains that Dr. Schultes (and others) now recognize, with scientific certitude, three separate species of *Cannabis* (A-45, 125, 130, 166, 213-215). Therefore the references, by the Court below to the *Adams* and *Leary* cases is somewhat difficult to explain. Not only were the references, in those cases, to the species of *Cannabis* pure *dicta*, but, what is particularly unsound, is that the testimony of the very expert Petitioner offered to produce, Dr. Schultes, is the same expert alluded to in the *Adams* and *Leary* cases! If Dr. Schultes' expertise was relevant in 1968 (*Adams*) and in 1969 (*Leary*),

why is it irrelevant in 1973 (*Rothberg*) – especially when the specific issue is now directly raised?

U.S. v. Moore, 330 F.Supp. 684 (E.D.Pa. 1970), cited by the Court below, is of no precedential value. In *Moore* there was no effort on the defendant's part to establish that *Cannabis* was polytypic and, furthermore, there was no effort, or offer of proof, to establish that the defendant possessed a species other than *Sativa*. In that case, defense counsel, cross-examining the Government's chemist, asked whether the chemist could distinguish between the *Cannabis Sativa* L. "variety" of marijuana and the *Cannabis Indica* "variety". Because the defense chemist said that he could not, the defense argued that the Government failed to meet its burden of proof that the substance in question was *Cannabis Sativa* L. It should be noted that the defendant and the Court, in *Moore*, assumed that they were dealing with an issue of "variety" (Ibid. at 686). In the instant case, it was made abundantly clear that "variety" is simply a subclassification of a single species (see e.g., A-107, 149, 150-153), and that Petitioner ROTHBERG was offering to prove that the Genus *Cannabis* has more than one *Species* and, moreover, that he did not possess the Species *Sativa* or any variety thereof.

Assuming, as the Court did in *Moore*, that the question presented to it involved different *varieties* as opposed to different *Species*, the Court concluded that *varieties* of *Sativa* were within the definition set forth in 26 U.S.C. §4761(2). If, in the instant case, Petitioner simply offered to prove that there were varieties of *Sativa* or that he possessed some variety of *Sativa*, then the reasoning in *Moore* might be applicable; however, such is not the case here. Whether *Cannabis Indica*

Lam. or *Cannabis Ruderalis Jan.* are distinct *Species*, as contended by petitioner and Drs. Schultes and Klein, or whether they merely constitute "varieties" of the Species *Sativa*, is obviously an issue of fact – the very issue petitioner wished to raise at trial. Unlike the situation in *Moore*, petitioner herein did not speculate on negatively answered questions, but, rather, made a compelling and substantial offer of proof that he could establish the existence of *Species* of *Cannabis* which were not *Sativa* and additionally, that the specific *Cannabis* he possessed was not of the Species *Sativa*. The differentiating characteristics of Species are not known to "forensic chemists" (such as the one in *Moore*) who have traditionally made marijuana *identifications* and who have no expertise with respect to the taxonomy of *Cannabis* which is a matter of *nomenclature* and *classification*. It is petitioner's contention that there are at least three scientifically distinct and recognized Species in the Genus *Cannabis*. These are not agronomic varieties. It is understandable that the District Court in *Moore* looked to legislative history since the issue presented to it was *not* clear on the face of the statute, i.e., whether "varieties" of *Sativa* were included in the statutory definition. The Court, in *Moore*, also cited "scientific authorities" in concluding that *Cannabis Indica* was "a geographical variety of *Cannabis Sativa* L." (Ibid. at 686). As stated above, the opinion of scientific authorities created an issue of *fact* which is for a jury, and not a Court, to determine.

Moore was affirmed (446 F.2d 448, 3d. Cir. 1971) on the same erroneous assumption that the issue involved a variety of *Sativa*. It is interesting to note that the Circuit Court said that Moore's argument might have validity if *Cannabis Indica* was

not in fact included within the classification *Cannabis Sativa* L. (446 F.2d at 450). In the instant case it is precisely this fact that petitioner wished, and offered, to litigate. Without commenting on the Circuit Court's resort to legislative history, petitioner simply points out that whether or not "congress intended the inclusion of the *Indica* variety within the definition of marijuana as set forth in 26 U.S.C. 4761" (Id. at 450) was *not* the issue before the Court in the instant case. In the instant case, the defense offered and intended to prove the existence of other *Species* of *Cannabis* and, perforce, other Species would be neither *Sativa* nor varieties or sub-Species of *Sativa* (A-149-155, 177-8). The assumptions and "evidence" in *Moore* being scientifically erroneous, it is understandable that the Court there ruled that a "variety (sub-Species)" of Sativa was, as a matter of law, *Cannabis Sativa* L.

Far more on point is a decision of the Supreme Court of Wisconsin in *State v. Greene*, 40 Wis.2d 88, 161 N.W.2d 239 (1968). The Wisconsin statutes are similar to the federal statutes controlling this case. One statute (dealing with narcotics) prohibited transactions involving *Cannabis Sativa* L., whereas another statute prohibited transactions involving *Cannabis Indica* (cf. 21 U.S.C. 176(a) with 21 U.S.C. §209). The Wisconsin Supreme Court ruled that in order for the state to secure a conviction under the narcotics statute "it was necessary for the state to prove that the substance sold to the police officer was *Cannabis Sativa* L." In that case, the conviction was upheld because the jury was instructed accordingly and presumably found, as a fact, that *Cannabis Sativa* L. was sold. A minority of the Court would have reversed the conviction "as a matter of law because there is a reasonable doubt as to the

identity of the substance sold . . .". In any event, the Court was unanimous in holding that the defendant had a right to *litigate* the question of whether the substance in question was *Cannabis Sativa* L.

In conclusion, the Trial Court's reliance on *Adams* and *Leary* was totally inappropriate for a variety of reasons, including but not limited to, the fact that neither of those cases addressed themselves to the issue at bar and, furthermore, the expert testimony referred to as *dicta* in both cases, came from Dr. Schultes, the very witness the Court, in this case, refused to permit petitioner to call. *Moore* is inapposite because there was no evidence offered or brought before the Court concerning the monotypism or polytypism of *Cannabis*.

IV

CRIMINAL STATUTES MUST BE STRICTLY CONSTRUED

Criminal statutes are to be construed strictly. In the recent case of *United States v. Bass*, 92 S.Ct. 515 (1971), the Supreme Court made the following statements concerning statutory construction:

(1) "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," (Ibid. at 522)

(2) "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative to require that Congress should have spoken in language which is clear and

(Ibid. at 522)

(3) "... Legislators and not Courts should define criminal activity," (Ibid. at 523)

(4) "Thus where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." (Ibid. at 523)

This fundamental rule regarding criminal statutes has been oft-repeated. See, e.g. *Rewis v. United States,* 401 U.S. 808 (1971); *Bell v. United States,* 349 U.S. 81 (1955). This doctrine is "as old as construction itself" (Marshall, C.J., in *United States v. Wiltberger,* 5 Wheat. 76, 5 L.Ed. 37 (1820).

The recognized reason for the rule of strict construction of penal statutes is that where life and liberty are at stake the burden is on the lawmakers to clearly define which activity is criminal and which is not. As Justice Holmes stated in *McBoyle v. United States,* 283 U.S. 25 (1931):

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." (at 27)

McBoyle held that the words "motor vehicle" could not be enlarged from their common meaning of a land vehicle to include an airplane in a prosecution under the National Motor Vehicle Theft Act for theft of an airplane. Significantly, the holding prevented enlargement of a statute using the *common*

terminology "motor vehicle". *A fortiori,* had Congress chosen to define "motor vehicle" in *technical* terms such as horsepower, or engine displacement there could be no argument that the Act could have been enlarged to include theft of other types of motor driven vehicles. Accord, *United States v. Wooten,* 239 F.Supp. 123 (E.D. Tenn. 1965), holding that transportation of the stolen body of an automobile on the frame of a non-stolen automobile did not constitute the theft of a "motor vehicle".

In *United States v. Limehouse,* 58 F.2d, 395, the Court noted that "in a criminal case . . . of a highly penal nature, a citizen should not be compelled to resort to *proceedings in Congress* to determine whether a course of action on his part is or is not prohibited by law, when the statute is fairly clear on its face". (emphasis added)

In the instant case the rule requiring strict construction of a criminal statute surely requires that the expression *Cannabis Sativa* L. be limited to its plain and undisputed meaning (the Genus *Cannabis* and the Species *Sativa* L.). This is all the more true where the critical words are technical in nature and are "narrow and precise" *(Bouie, supra).* To require Petitioner to be familiar with testimony given before a Congressional Committee in 1937, besides being a clear violation of the Due Process Clause, is certainly inconsistent with the requirements of "strict construction" of criminal statutes. Here, the Court below, not only failed to construe the statute strictly, it completely ignored the plain meaning of the words themselves. If the motivation of the Court below was to supply what it thought to be an omission in the statute (i.e., coverage of other Species of *Cannabis)* such retrospective expansion was improper. Under the doctrine of *Casus Omissus,* omissions in a statute cannot be

supplied by construction. Thus if a particular object, such as another Species of *Cannabis*, is omitted from the *terms* of a statute (even though such an object might later be thought to be within the purpose of the statute) and even if the omission later appears to have been due to accident, misinformation or inadvertence, a court cannot include the omitted object by changing the words of the statute. This is equally true where the omission was due to the failure of the legislature to foresee a future situation such as may be the case here.

In the instant case, the Courts below enlarged the ambit of §176(a) to include other Species of *Cannabis* not specifically covered by the terms of the statute apparently on the theory that either the legislature was misinformed about the number of Species of *Cannabis* or that the legislature intended to prohibit any *Cannabis* material without respect to Species. Even assuming this to be true, it is settled that courts must avoid "the retrospective expansion of meaning which properly deserves the stigma of judicial legislation", *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 at 167 (1944).

V

IF THE STATUTE IS HELD TO COVER CANNABIS NON-SATIVA THEN IT IS VOID FOR VAGUENESS.

Assuming, for the purpose of argument only, that the expression *Cannabis Sativa* L. is not clear on its face or is considered ambiguous, then the ambiguity should be resolved in favor of Appellant, *U.S. v. Bass, supra.* A contrary interpretation would render the statute void in that the "interpreted"

statute fails to give proper notice (see Point II, supra).

The Courts below placed great emphasis on "the meaning of *Cannabis Sativa* L. as used in the statute *when enacted by Congress in 1937*" (Judge's Opinion A-270).

Petitioner contends that the notice requirement demanded by the Due Process Clause means *present* notice. Thus, even if the statutory definition gave adequate notice in 1937, it fails to give adequate notice as applied to an event occuring in 1971. In other words, assuming *arguendo* that the expression *Cannabis Sativa* L. gave adequate notice (in 1937) that all Species of *Cannabis* were covered because "the general consensus of opinion among botanical taxonomists was that *Cannabis* was monotypic" (Judge's Opinion, A-270, and Opinion of the Court of Appeals), the statute would surely not give adequate notice 35 years later when the "factual" basis for the description no longer exists or, at least, is subject to serious question. As the Supreme Court stated in *Leary, supra:*

> ". . . a statute based upon a legislative declaration of facts is subject to . . . attack on the ground that the facts no longer exist; in ruling upon such a challenge, a Court must, of course, be free to re-examine the factual declaration." (395 U.S. at 38, fn. 68)

Where a technical phrase is *contingent* on the state of biological knowledge 35 years ago, that language fails to be definite as to its meaning today even though its language is precise.

In *U.S. v. Adams, supra,* the Court noted that:

> "Nature and the Constitution alike bar Congress from legislating the existence of facts that do not exist. Congress

cannot declare, and thus make it generally true, that felons in possession of guns have "very probably" received them from across state lines, because that is not known – and has not been shown – to be generally true. *Tot v. United States, supra.* For the same reason, Congress cannot authorize a jury to find from a man's presence near a still, without more, that the man has "possession, custody and control" of the still. *United States v. Romano, supra.*" (293 F. Supp. at 783)

Not only does the new definition fail to give present notice, but this confusion is enhanced by the existence (in the same title) of legislative recognition of *Cannabis Indica*, 21 U.S.C. 209.[1]

21 U.S.C. 209, which was in effect along with 21 U.S.C. 176(a) at the time of Petitioner's arrest, prohibits certain transactions involving *inter-alia "Cannabis Indica"*. The Court in *Moore, supra,* refused to consider the effect of § 209 by stating that "this section . . . was intended to prohibit the transfer of *that substance* in the United States consular districts in China", 446 F.2d at 451. This analysis simply misses the point. The fact that § 209 may be construed as applying to transactions in China is of no consequence whatever since the issue concerns *definitions* and not *jurisdictions*.

Congress is always presumed to be aware of its own enactments. § 209 prohibited sale of *Cannabis Indica*. § 176(a) prohibited sale of *Cannabis Sativa* L. What difference does it make if the prohibition of "that substance" *(Moore, supra)* related to China or to Kalamazoo? The situation is on "all fours" with *State v. Greene, supra.* The existence of § 209 cannot be so easily ignored.

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1. Repealed with 21 U.S.C. 176(a) and 26 U.S.C. 4761.

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process." *Connally v. General Construction Company,* 269 U.S. 385, 391. See also *Baggett v. Bullett,* 377 U.S. 360, 376 (1964).

Obviously, Congress could have defined marijuana the same way that it did the so-called narcotic plants; to wit: by their common as opposed to their *scientific names.* The fact that Congress elected to use a taxonomic description for marijuana and declined to do so with respect to narcotic plants points out that Congress was, at least, aware of its options.

Indeed, it is interesting to note that the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et. seq.), which became effective on May 1, 1971 and which *repealed all* of the statutes involved in the instant case, again adopted the specific taxonomic description, *Cannabis Sativa* L. as a definition for the term "marijuana", 21 U.S.C. § 802(15). However, in an apparent effort to avoid an overly restrictive limitation,[1] the statute also prohibits the chemical compounds known as Tetrahydrocannabinols (21 U.S.C. 812 – Schedule 1[17]). The Tetrahydrocannabinols are the particular chemicals thought to be the active constituents of marijuana, that is to say, the Tetrahydrocannabinols are the specific chemicals which create, upon ingestion, "the intoxicating effect" which Congress

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1. This is analogous to the British drug laws which define prohibited marijuana as "the flowering tops of *any Species* of the Genus *Cannabis*", (A-89).

presumably wished to prohibit (see e.g. A-219). Thus, under the new law, Congress may have prohibited transactions involving *any* material which contains the so-called "psychoactive" chemicals without regard to Species. Therefore, presumably, if a Species of *Cannabis* other than *Sativa* was possessed, a prosecution could be based upon the possession of ". . . . any material, compound, mixture or preparation which contains any . . . (17) Tetrahydrocannabinols", a Schedule I Controlled substance.

Such is not the situation in the case at bar. § 176(a) prohibited transactions involving a *particular Species* of a particular plant. That the District Court's interpretation of § 176(a) was in error may also be demonstrated by various analogies. There are, presumably, numbers of state or local statutes prohibiting the harboring of various wild animals. In a hypothetical case where an individual is charged with harboring a lion, for example, and where the expression "lion" is defined by its taxonomic classification, *Felis Leo*, surely a prosecution could not be maintained where the evidence available established only that the defendant possessed *some* Species of the Genus *Felis*. Obviously, the prosecution would have to establish that the defendant possessed the Species *Leo*, excluding (beyond a reasonable doubt) that he possessed some other Species, e.g. *Felis Domesticus* (the common house cat).

Another example may be found in the Atomic Energy Act of 1954 (P.L. 83-703). One of the purposes of this Act was to prohibit the possession and transfer of various radioactive substances without special licenses granted by the Atomic Energy Commission. The Act lists the regulated substances with great specificity, e.g., Cobalt-60, Strontium-90, Carbon-14, etc.,

etc. Possession or transfer of any of the listed radioactive substances without license is punishable as a criminal act. Conspicuously absent from this list is the basic element Radium. Radium, as this Court may judicially notice, is a highly radioactive substance, yet it is quite clear that the possession and/or transfer of Radium is not covered by the Act and, therefore, such possession and/or transfer would not be punishable under the Act, despite the fact that Radium is, without doubt, a radioactive substance.

In the instant case transactions involving a certain Species of the Genus *Cannabis* were prohibited. Petitioner offered to prove that he did not possess the specified Species. The Court refused Petitioner his "day in court" and said, in effect, that even if he could establish possession of another Species (whether it be *Indica, Ruderalis,* etc.) the statute, which clearly prohibited only *one* Species would be "construed" to prohibit any other Species. If such interpretation be upheld, the statute, as applied, is clearly void for vagueness and indefiniteness.

VI

THE COURTS BELOW, BY EMPLOYING LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION IN ORDER TO ENLARGE A CRIMINAL STATUTE THAT IS CLEAR ON ITS FACE, ACTED IN VIOLATION OF THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS.

The use of "legislative history" in order to ascertain the intention of Congress as to the coverage of a precise statute constitutes an impermissible inquiry into Congressional motiva-

tion and is thus in derogation of the Constitutional principle of granting finality to the actions of a co-ordinate branch of Government. This error is compounded, in this case, since there is no satisfactory criteria for determining Congressional intention other than the clear and precise words of the statute itself. Thus, in *United States v. White*, 475 F.2d 1228 (4th Cir., 1973), the Court unequivocally stated the law:

> We look to the unambiguous words of the Criminal Statute to determine its meaning and not to the purported intentions of a Congressional Committee . . . *Carlson v. United States*, 296 F.2d 909 at 911 (9th Circuit 1961)

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962), which former Chief Justice Earl Warren called the most important decision handed down during his tenure on the Court, dealt with the question of the separation of powers in relation to the "political question" doctrine. While it was found that there was a Constitutional violation in the way the Tennessee legislature was apportioned, the previous decision in *Colgrave v. Green*, 328 U.S. 549, had held that there was no judicial remedy for the violation since the case was a "political question" and thus non-justiciable.

The Court in *Baker* overturned the precedent of *Colgrave* and held that mal-apportionment of state legislatures is a justiciable question that is amenable to the Court's relief. In deciding the question, the following was stated as to the nature of the separation of powers:

> . . . [I]n the Guarantee Clause cases and in the other "political question" cases, it is the relationship between the

judiciary and the co-ordinate branches of the Federal Government, and not the federal judiciary's relationship to the states, which gave rise to the "political question". (369 U.S. at 210)

In the case at bar, we have a situation in which a federal Court, by its attempted use of legislative "history", reworded a criminal statute.

The Court held that the defendant's offer of proof was irrelevant since "[t]he crux of the dispute is the meaning of *Cannabis Sativa* L. as used in the statute when enacted by Congress in 1937." (Judges Opinion A-270.) The Court went on to state that its reading of the legislative history of the original Marijuana Tax Act of 1937, manifests an intention, on the part of Congress, to prohibit all *Cannabis*, and thus the statute in question does not mean what it clearly and specifically states. The Court cited the testimony of Dr. Lyster H. Dewey of the Department of Agriculture in 1937 in support of its contention, (A-270).

This use of "legislative history", in order to determine Congressional motivation as to the breadth of the statute's coverage, is in error.

As a practical matter, the intention of Congress is not really discoverable except on the basis of the clear language of the law. The use of legislative history to override the plain words of the statute involved the Court in a task which violated the Separation of Powers doctrine, particularly when the Court based its decision on the testimony of Dr. Dewey, who was not even a member of that lawmaking body.

It is Petitioner's contention that when a penal statute is clear and specific on its fact, there arises no duty on the part of a Court to look beneath the surface for a hidden intention. To do otherwise is to go beyond judicial power and invests the Court with a lawmaking function. The Delaware Supreme Court has stated:

> "It is an elementary proposition that Courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law is plain and within legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the Court as upon every citizen. To allow a Court, in such a case, to say that the law must mean something different from the common import of its language, because the Court may think that its [wording is] unwise . . . would make the judicial power superior to the legislative branch of Government, and practically invest them with lawmaking power. The remedy for [a poorly written law] is not in interpretation but in amendment or repeal." *State v. Duggan*, 15 R.I. 403, 6 A. 787 (1886).[1]

Mr. Justice Cardozo stated that where a statute is clear as to its proscription, it is not the province of the Courts to rewrite it in order to proscribe similar activities because the judge believes such a reading is more in accordance with the Court's view of justice and reason:

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1. As noted before §176(a) and its definitional statute, 26 U.S.C. 4761, were in fact repealed and replaced with broader definitions (see p. 38 and 39, *supra*).

> We do not pause to consider whether a statute differently framed would yield results more consonant with fairness and reason. We take the statute as we find it, *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).

The dangers of the judicial branch invading the domain of another branch of Government by acting in a situation for which it has no power gave rise to the constitutionally mandated "political question" doctrine. The same dangers pertain to the instant case.

Under the second prong of the Court's test in *Baker*, it was held that the judicial branch would not make a determination unless there are "satisfactory criteria" (manageable standards) for granting relief. It is Petitioner's contention that the clear words of a penal statute contain satisfactory criteria for judicial determination, whereas there are no manageable standards for ascertaining, from "legislative history", Congressional motivation as to coverage of an act (assuming, *arguendo*, that a Court can ever look beyond the words of a clear penal statute).

The first prong of *Baker's* test of judicial power is relevant to the case at bar. This prong states that under our system of Government with its separation of powers into three coordinate branches, the respect due the legislative branch requires the judiciary to grant finality to legislative actions (as exhibited in the clear statute at hand) rather than for the Court to rewrite a law to engage its coverage.

The Court in *Baker* stated the following rule concerning the validity of enactments.

> The respect due to coequal and independent departments,

and the need for finality and certainty about the status of the statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. (369 U.S. at 214, 7 L.Ed.2d at 684.)

The principles discussed in *Baker, supra,* were long recognized by the Supreme Court. These earlier cases state that it is impermissible for the judiciary to inquire into the motivation of the legislature in enacting a statute. When the District Court attempted to enlarge the clear and precise wording of § 176(a) in order to effect supposed congressional intention the Court, in effect, re-wrote the statute.

This view is supported by Mr. Justice Cardozo in *United States v. Constantine,* 296 U.S. 287 (1935), which raised the question whether a purported tax on those engaged in the liquor trade was a legitimate exercise of the taxing power of Congress or whether it was in fact a penalty, and thus beyond its power.

> The judgment of the Court rests upon the ruling that another purpose, not professed, may be *read beneath the surface,* and by the purpose so imputed the statute is destroyed. Thus the process of *psychoanalysis* has spread to unaccustomed field. There is a wise and ancient doctrine that a Court will not inquire into the motives of a legislative body.

Similarly, it is beyond the power of the judiciary to determine when prohibition of an activity is necessary for the effectuation of a congressional regulatory scheme. The Court below, by refusing the offer of proof that Petitioner possessed

Cannabis non-Sativa, acted in derrogation of this rule. Mr. Justice Holmes stated the principle as follows:

> . . . I had thought the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon the questions of policy or *words. Hammer v. Dagenhart*, 247 U.S. 251 (1918).

In those cases in which the Courts have resorted to the use of legislative history, they have limited its employment to the question of whether the legislature had the *power* to act under the Constitution. Even in these situations, legislative history has been used to *narrow* rather than enlarge a penal statute.

The use of "legislative history" is fraught with danger when employed by the Courts, particularly in a case involving a statute that is clear on its face. The reason is that given the amorphous nature of congressional proceedings, a Court may find itself rewriting statutes by finding that portion of the "history" that is suitable to the Court's particular inclination.

Our system of separate branches of Government requires a clearly discernable division of responsibility. The judiciary has performed its functions of interpretation when it confines itself to the clear language of statutes.

In the cases in which legislative history has been utilized it has been confined to those situations in which the question before the courts was whether the legislature was acting within its *Constitutional power* in enacting the law in dispute. This is, of course, a legitimate function of the judiciary.

[S]ometime, congress itself has said that a particular activity affects commerce, as it did in the [Fair Labor Standards Act] .... In passing on the validity of legislation of the class last mentioned, the only function of Courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. *United States v. Darby*, 312 U.S. 100 (1941)

Thus, in the case of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L.Ed.2d 258 (1964), the question before the Court was whether the fair accomodation section of the Civil Rights Act of 1964 was a Constitutional exercise of power by the Congress. In this case, the Court looked to legislative history for two purposes. First, it looked to the legislative finding of facts as to the impact of racial discrimination on interstate commerce. This is proper since, under our scheme of Government, a Court is not bound by congressional findings, in determining whether the facts support a Constitutional exercise of legislative power.

... Congress here determined for itself that refusals of service to Negroes have imposed burdens both upon the flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.[1]

The Court's second purpose in its use of the legislative

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1. The above quote is from *Heart of Atlanta's* companion case, *Katzenbach v. McClung*, 379 U.S. 294 at 303-4.

history was to aid in the determination of whether the statute was within the Constitutional power of the Congress.

> The sole question posed, is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the act indicates that Congress based the Act on §5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce . . . . The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by Congressional action based on the commerce power of the Constitution". . . . Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. 379 U.S. at 249-50.

Thus, as is clear from *Heart of Atlanta* and from its companion case, *Katzenbach v. McClung*, 379 U.S. 294, 13 L.Ed.2d 290 (1964), the Court will never inquire into Congressional *motives* or *intent* where a statute's avowed purpose is within the Constitutional power of Congress. That Congress has legislated against "moral wrongs" by using one of its enumerated powers (e.g. the Commerce Clause) has never rendered a

statute invalid, *Heart of Atlanta,* Ibid. at 256-7 and footnote eleven (11) Ibid. at 276. Indeed the Marijuana Tax Act itself withstood inumerable attacks based upon the argument that the *real* purpose of the tax was not to collect revenue (a Constitutionally enumerated Power of Congress) but was really intended to prohibit the possession of *Cannabis,* a prohibition which, standing alone, would be beyond the power of Congressional regulation, see, e.g. *United States v. Sanchez,* 340 U.S. 42 (1950) which held that the Act was not invalid as a tax "despite its obvious collateral regulatory purpose and effect". Similarly § 176(a) has always been upheld as part of Congress' "plenary power to prohibit foreign importations . . . ", *Daut v. U.S.,* 405 F.2d 312 (9th Cir. 1968) at 315.

As is well illustrated by the cases above, federal Courts will not disturb a federal statute which is otherwise Constitutionally valid on the grounds that Congress intended to regulate some activity over which it had no direct authority. In the instant case speculations, based on testimony before a congressional committee, as to what Congress' motivation and intent were, must not be used to vary or enlarge a clearly worded criminal statute. To do so is to legislate and not to adjudicate.

VII

THE DISTRICT COURT'S STATEMENT OF PETITIONER'S POSITION IS INACCURATE.

In Judge Bartel's written opinion (A-266) he states that:

It is the defendants' position that if, after viewing the proof offered, the court were to find that Cannabis indica was a

species separate from Cannabis sativa, the evidence examined by the court would be submitted before the jury and a motion to acquit would thereafter be made pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

This is an inaccurate statement of Petitioner's position in the District Court. Petitioner at no time asked the District Court to make a fact finding and most certainly did not ask the Court to determine as a matter of fact whether *Cannabis Indica* was a Species different from *Cannabis Sativa* L. Petitioner contended throughout that the question of whether there was one or more Species of *Cannabis* and whether he possessed the prohibited Species was a question of fact for a jury to decide (see e.g. A-263-4). The evidence adduced before the District Court was an "offer of proof" only. It was Petitioner's position, as a result of prior discussions with counsel for the Government, that the District Court should determine, pre-trial, certain questions concerning the admissibility of evidence. That is to say, counsel for Petitioner and counsel for the Government did not wish to litigate at length the critical issue during a jury trial if the Court was going to rule, as a matter of law, that it did not make any difference if Petitioner possessed a *non-Sativa* Species of *Cannabis*. The District Court's written opinion is misleading insofar as it indicates that Petitioner relinquished his right to a jury trial on *any* issue of fact (see e.g. A-17-24, 30, 33-34).

Indeed the issue on appeal is fairly well stated in the Government's Consent to Appeal (A-282-3). The question before the District Court was purely one of law; specifically, whether or not the Government was obliged to prove, during trial, that the material in question was that particular Species of plant matter known as *Cannabis Sativa* L. and, additionally,

whether Petitioner would be permitted to adduce evidence before the jury that he did not possess such material. Obviously, if the Court ruled against Petitioner (as it did), it would have been an enormous waste of energy to litigate this issue before a jury only to have the Court later rule that the Petitioner never waived his right to try the factual issues before a jury.

VIII

THE OPINION OF THE COURT OF APPEALS IS BASED ON MISAPPREHENSIONS OF LAW AND FACT

The opinion of the Court of Appeals, though giving lip service to the principle that clear statutes cannot be judicially amended to cover what they do not on their face cover, nevertheless contrived to broaden materially the statutory proscription of 176(a). Interestingly, the Court of Appeals ignored the various theories of the District Court, and held instead that the petitioner in this case had "fair notice" that what he did was prohibited. The Court reasoned that since "the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marijuana", all Cannabis was therefore included under the ban, even if it later turned out that there was more than one species. Thus essentially the Court of Appeals read the definition "*Cannabis Sativa* L." in 26 U.S.C. 4671 to be simply "Cannabis," because "everyone" knew *Cannabis Sativa* to be the same as *Cannabis*. And while the testimony of all the experts was unanimous that *Cannabis Sativa* L. is not the same as Cannabis, the Court of Appeals felt that it does not matter whether the law is "scientifically exact or not". The Court then

concluded that the opinion of the defense experts was irrelevant, since it was formed after the offense was committed. This analysis, however, not only totally misses the point, but is based upon serious misapprehensions of fact and law.

In the first place, everyone did not know that Cannabis had only one species. As was brought out in the testimony of the various experts, *Cannabis Sativa* was first identified as a species by Linnaeus more than two hundred years ago. At the same time Lamarck, one of the founding fathers of the science of botany, identified *Cannabis Indica* Lam. as a species separate and distinct from *Sativa.* Russian botanists throughout the twentieth century also viewed *Indica* as a separate species. Indeed, the fact that the world-renowned Russian botanists, Zhukovski and Vavilov, studied cannabis in its natural habitat, Central Asia, gave great weight to their view. Thus, the opinion Doctor Schultes formed after he visited Afghanistan and corroborated the observations of the Russians was hardly a novelty.

Moreover, and of utmost importance to this case, it was never even clearly understood by Congress that Cannabis had only one species. For when the *sativa* statute was passed in 1937, there existed another statute (21 U.S.C. 209) which banned transactions in *Cannabis Indica.* And the *Cannabis Indica* statute remained in effect, along with the *sativa* statute, until both were replaced by the new comprehensive drug law (21 U.S.C. 801, et. seq.). Thus, if Congress identified two forms of Cannabis in its own laws, how can a court prevent a defendant charged with possessing *sativa* from proving that he possessed *indica,* and that *indica* is not the same as *sativa?* Additionally, what kind of "fair notice" could be given if, as the Court wrote,

it does not matter whether the law is "scientifically exact or not?" Surely a criminal statute must always be "exact" or it is void for vagueness. Scientific or technical terms, which are carefully structured so as to be exact and precisely understood, cannot have their precise meaning fudged by some legislative or judicial sleight of hand without necessarily undermining notice requirements. Thus, it is wholly contradictory for the Court of Appeals to say on the one hand that fair notice has been given and on the other to state that it is irrelevant whether the words that give fair notice are exact or not.

In sum, the Court of Appeals neatly overlooked the fact that the monotypism *vel non* of Cannabis was never a scientifically settled principle, and, more seriously, the Court of Appeals neglected to consider the parallel existence of 21 U.S.C. 209 which makes absurd its "fair notice" findings.

In addition, the holding in the opinion that the evidence of the defense witnesses was irrelevant because the experts' conclusion was reached after the offense makes no sense at all. The issue in the case is not when someone decided what it was that the petitioner possessed, but what it was. If the petitioner possessed *indica* he cannot fairly be prosecuted under the *sativa* statute, and if the government cannot prove that he possessed *sativa*, there is then insufficient evidence to convict the petitioner under 176(a). Beyond this, the Court of Appeals totally ignored the fact that the evidence the petitioner presented was only an offer of proof. It may well be, given the centuries old debate about how many species of Cannabis there are, that the petitioner could upon trial produce experts who thought Cannabis indica was a separate species in 1937 or

anytime before the offense, if such a requirement is necessary.*

Thus, it appears as if the Court of Appeals decided that the petitioner was just a "hashish dealer" and contorted the law and the facts to reach the result it wanted to. The Court paid little attention to the clear language of the statutes involved nor did it appreciate the science of the case. The petitioner was thus effectively denied his day in court and was prevented from proving that he did not possess the substance the government charged him with possessing. Such a result has nothing to do with due process.

IX

THE ISSUE PRESENTED BY THIS CASE IS OF CONTINUING IMPORTANCE AND SHOULD BE RESOLVED BY THIS COURT.

The opinion of the Court of Appeals mentioned, without discussion, that the issue presented by this case is now academic because of the passage of the new drug law (21 U.S.C. 801 et seq.). A close reading of the new statutes, however, reveals that this is not so clear. Presumably, the Court of Appeals felt that the scheduling of tetrahydrocannabinols (THC) as a controlled drug (21 U.S.C. § 812, sched. I(c)(17)) will cover all species of Cannabis, since THC is the active chemical ingredient in the

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*Indeed if the Court of Appeals opinion means that the defense proferred here is available to defendants charged with crimes occurring after the Schultes expedition to Afghanistan, but is not available to acts committed before that date, then the result is a truly absurd one.

plant and induces the "high" of marijuana and hashish. However, the drug schedule also specifically lists marijuana as a controlled substance (21 U.S.C. 812, Sched. I(c)(10)), and still defines marijuana as *Cannabis Sativa* L. (21 U.S.C. 802 (15)). Because of the recognized principle of statutory construction that legislative enactments will not be regarded as surplusage, it seems most likely that the ban on THC was enacted to cover only chemically synthesized THC, and was not meant to apply to marijuana which is specifically listed and defined elsewhere in the schedule. Accordingly, the defense raised by the petitioner in this case, that non-*sativa* species of Cannabis are not covered by the laws relating to *Cannabis Sativa* L., will undoubtedly become a recurrent theme in marijuana prosecutions, particularly as the views of Doctor Schultes become more well-known.* This Court should therefore resolve the issues presented here in order to settle the matter, not only for future cases under both state and federal laws, as well as for still pending cases under 176(a), but also to assure the petitioner here of the right to which every defendant is entitled – to present his defense to a jury.

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*Indeed, recently the defense offered by the petitioner here was offered in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, in the case of *State v. Wilcox* (Case No. 72-8752), since the Florida law (Florida Stat. 404.01(12)) also defines marijuana as *Cannabis Sativa* L. In contrast to the result below, the Florida court allowed the scientific defense to go to the jury, and the result was a verdict of acquittal. As a consequence, a bill has been introduced in the Florida House of Representatives (H.R. Bill 2118) to change the statutory definition of marijuana to cover species other than *sativa*. Furthermore, because of the not inconsiderable reporting and publicity of this case and the case in Florida, this writer has received numerous telephone calls from attorneys throughout the country seeking information for presentation of the defense in court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MICHAEL H. METZGER
Attorney for Petitioner
2185 Union Street
San Francisco, California 94123
(415) 563-2520

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 851 – September Term, 1972.

(Argued May 9, 1973 Decided June 8, 1973.)

Docket No. 73-1310

UNITED STATES OF AMERICA,

Appellee,

v.

MITCHELL ROTHBERG,

Appellant.

Before:

SMITH, MULLIGAN and TIMBERS,

Circuit Judges.

Appeal from conviction on plea of guilty on charge of receiving, concealing and facilitating the transportation and concealment of illegally imported hashish, a derivative of marihuana, with reservation of right to appeal on consent of the government, in the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*.

Affirmed.

MICHAEL H. METZGER, San Francisco, Cal., *for Appellant*.

GUY L. HEINEMANN, Asst. U.S. Attorney (Robert A. Morse, U.S. Attorney for the Eastern District of New York, L. Kevin Sheridan, Asst. U.S. Attorney, of counsel), *for Appellee*.

SMITH, *Circuit Judge*:

Appellant Rothberg, inidicted for transporting concealing and facilitating the transportation and concealment of illegally imported "hashish, a derivative of marihuana," in violation of 21 U.S.C. § 176(a), in the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, offered to prove that the substance imported from Afghanistan was not Cannabis Sativa L., the definition of marihuana set forth in the Internal Revenue Code, 26 U.S.C. § 4761 and incorporated in 21 U.S.C. § 176(a), but Cannabis Indica Lam., a separate species. The offer of proof was rejected and the government consenting, with the approval of Judge Bartels, on the preservation for consideration on appeal to this court of the question

whether the offer of proof was properly rejected, a plea of guilty to count two of the indictment was entered.[1] We find no error and affirm the conviction.

In construing a statute to determine the intent of Congress, we must do so in light of the conditions under which the Congress did act. *See, e.g., Moor et al. v. County of Alameda et al.*, ——— U.S. ——— (1973), 41 U.S.L.W. 4627, 4632. "Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct. . . even in determining whether such statutes meet that test, they should be given their fair meaning in accordance with the evident intent of Congress," *United States v. Sullivan*, 332 U.S. 689, 693-94 (1948). *See also Postma v. International Brotherhood of Teamsters*, 337 F.2d 609, 610 (2d Cir. 1964); *Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1017 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). To determine whether a criminal statute fairly apprises potential violators of the nature of acts prohibited, it may be that we should consider whether the meaning of terms has in general usage so changed since the enactment as not at the time of the offense to give such fair notice. No such change in general usage at the time of the offense was shown by the proffered proof, however.

The most that the proffered proof could have established was that at the time of trial there was some and perhaps growing

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1. See *United States v. Mann*, 451 F.2d 346 (2d Cir. 1971); *United States v. Doyle*, 348 F.2d 715, 719 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); and *United States v. Selby*, ——— F.2d ———, slip op. 2813 (2d Cir., April 11, 1973).

botanical opinion that Cannabis is polytypal and that a distinction can be made between Cannabis Sativa L. and Cannabis Indica Lam. This opinion was, however, formed by appellant's experts only after the offense here in question. At the time of the enactment and amendment of the statutes[2] in 1937 and 1956 and up to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana so that this Afghan hemp was included within the statutory definition. *See Leary v. United States*, 395 U.S. 6, 50 and n. 106 (1969). Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.

To be sure, the use of a term in a criminal statute by a legislature under a misapprehension as to the object described by it could not be corrected by a criminal court's amendment of the statute, but that is not the case here. There was no misapprehension by the Congress as to the generally accepted meaning of the term when used, and no showing under the offer of proof of any change in the generally accepted meaning up to the time of the offense. The statute as written must be read to cover the offense charged.

For the future, it would appear that the question is academic, since the statute has been replaced by the present drug abuse

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2. Repealed since the offense in question.

prevention and control acts,[3] with much broader descriptions of controlled drugs in addition to the description in question here, the broader descriptions concededly covering this substance whether described as one designation of Cannabis or another.

Judgment affirmed.

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3. See 21 U.S.C. §801 *et seq.*

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES OF AMERICA

v.

MITCHELL ROTHBERG et al., Defendants.

No. 71-CR-164.

United States District Court,
E. D. New York,
Nov. 30, 1972.

Criminal Law 472
Drugs and Narcotics 46
Statutes 221

Although phrase "Cannabis sativa L." within statute defining marihuana as all parts of the plant Cannabis sativa L., whether growing or not, is a botanical one, it is clear from legislative history and consensus of botanical opinion that Congress not only meant to but actually did include Cannabis indica in its use of phrase; accordingly, defendants' offer of proof in support of motion for acquittal that genus Cannabis was polytypic (having more than one species).

BARTELS, District Judge.

Defendants Rothberg, Wilson, and Brittman have been indictment for transporting, concealing and selling marihuana in

violation of 21 U.S.C. § 176a. The term "marihuana" as used in that section, is defined in 26 U.S.C. § 4761 (Internal Revenue Code) as ". . . .all parts of the plant *Cannabis sativa L.* . . . ." Defendants contend that the Government must prove beyond a reasonable doubt that the specific subject matter of the indictment was Cannabis sativa L. and that, as a matter of law, this will be impossible because what the defendants imported into the United States came from Afghanistan and was Cannabis indica Lam. Accordingly, they made an offer of proof to establish that genus Cannabis is polytypic (having more than one species) and that Cannabis indica, being a separate species, fell without the statutory definition. It is the defendants' position that if, after viewing the proof offered, the court were to find that Cannabis indica was a species separate from Cannabis sativa, the evidence examined by the court would be submitted before the jury and a motion to acquit would thereafter be made pursuant to Rule 20 of the Federal Rules of Criminal Procedure.

The Government moved to reject the offer of proof, and to strike any expert testimony relating to the mono-or poly-typic nature of Cannabis, contending (1) that the meaning of "Cannabis sativa L." as it is used in 26 U.S.C. § 4761, is clear, in that Congress intended to include in the definition all forms of Cannabis, not excluding Cannabis indica, wherever grown and however typed by professional taxonomists, and (2) that in all events Cannabis sativa L. is and always was a monotypic species.

To establish that there are at least two scientific and recognizable species in the genus Cannabis (sativa L. and indica Lam.) which are morphologically distinct in growth habit, form, and other attributes, defendants tendered the testimony of Dr.

R. E. Schultes, Professor of Biology and Director of the Botanical Museum at Harvard University, and Dr. William Kelin, Jr., Assistant Director of the Missouri Botanical Gardens.[1] In essence, they testified that from their studies of the genus Cannabis in its natural habitat in Afghanistan and in experimental sites in Mississippi, and from an examination of all botanical taxonomic literature treating the nature of the Cannabis plant, it was their conclusion that genus Cannabis was polytypic with three recognizable separate species, C. sativa L., C. indica Lam., and C. Ruderalis Jan., and that the Cannabis coming from Afghanistan (the place of origin alleged by the Government in this case) was C. indica Lam. and not C. sativa L.[2] Both admitted, however, that when Congress enacted 26 U.S.C. § § 4741 and 4742 (predecessors of the present statute), containing the definition of marihuana as Cannabis sativa L. it was the generally accepted opinion among botanical taxonomists in the English speaking world that Cannabis sativa L. was monotypic, that Cannabis indica was simply a part or variety of Cannabis sativa, and that moreover such is the

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1. Professor Schultes and Dr. Klein both testified at the trial of United States v. Holleman, Honeyman, Reed, No. 71-1035 RHS, before the United States District Court in San Francisco, which testimony has been made part of the official record in this case.

2. Schultes and Klein contended that the morphology (size, shape, form) of the plants differed in that Cannabis sativa L. is composed of very narrow leaflets with fine saw-toothed edges, that its branching is loose, and that it is much larger in height than Cannabis indica, which, they claimed, was extremely compact and bunched together, had coarser and broader leaflets and deeper veins. But see Lears v. United States, 395 U.S. 6, 50, and in 106, 89 S.Ct. 1532, 1555, 23 L.Ed.2d 57 (1969), where Mr. Justice Harlan, in referring to Dr. Schultes' testimony, said: " . . . As for appearance, it seems that there is only one species of marihuana, and that even experts are unable to tell by eye where a particular sample was grown. . . ."

generally accepted opinion of botanists and taxonomists in America today. Indeed, both experts testified that they themselves had subscirbed to this opinion although with some doubts up until they travelled to Afghanistan for a field study of the Cannabis in 1971 at the instance and expense of counsel for the defendants in United States v. Honeyman, N.D. Cal. Cr. 71-1035, September, 1972, who is also counsel for defendant Rothberg in the present case.

The Government's position is simply the opposite. It contends that Cannabis sativa is monotypic and that Cannabis indica is only a part or variety of the species and not a separate species. In support of its position the Government offered the testimony of Dr. Ernest Small, a botanical taxonomist associated with the Canadian Department of Agriculture. Dr. Small testified that under the criteria of both biological and morphological[3] schools of thought, Cannabis indica was not a separate species of the genus Cannabis sativa.[4] It was his opinion that in 1937 (the year of the enactment) Cannabis was thought to be a monotypic species by botanists in the English

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3. The "biological species" school of thought defines a species as group or assemblage of actually or potentially interbreeding organisms which are reproductively isolated from other interbreeding organisms. The "morphological school" of thought defines a species as a geographically distinctive assemblage of organisms which are morphologically distinctive. Botanical taxonomists use either or both approaches, depending on varying scientific philosophies, in categorizing various species.

4. Dr. Small contended that his examination of the Cannabis plant indicated that all populations of Cannabis are reproductively continuous, i.e., they all interbreed. He also indicated that the morphological distinctions between indica and sativa L. were too minor to justify a separate species classification.

speaking world. He agreed that the subject matter is a somewhat subjective and arbitrary art, and that taxonomists frequently change their judgments about the classification of species.

In this battle of experts the court felt compelled to call its own witness and did so by calling Dr. Arthur Cronquist, Director of Botany of the New York Botanical Gardens and the author of many texts upon botanical subjects. Dr. Cronquist questioned the reliability of the Russian botanists, Zhukovski, Vavilov, and Janischevsky, and the French botanist, Lamarck, upon whom both Dr. Schultes and Dr. Klein heavily relied in reaching their conclusion, and categorically disagreed with both Dr. Schultes and Dr. Klein, concluding unequivocally that there was only one species of Cannabis, and that the experts have not found any taxonomical difference between sativa and indica but only variations which in such a wide species as Cannabis were taxonomically insignificant. He subscribed to the conclusion of all the other experts that in 1937 the general consensus of opinion among botanical taxonomists was that Cannabis was monotypic.

The crux of the dispute is the meaning of Cannabis sativa L. as used in the statute when enacted by Congress in 1937. At that time there were hearings before the House Committee on Ways and Means at which the Commissioner of Narcotics, Dr. H. J. Anslinger, testified that Cannabis indica was the same drug as Cannabis sativa but was known in different countries by different names "in accordance with the geographical origin of the particular plant." Dr. Lyster H. Dewey, a botanist in charge of fibers at the Department of Agriculture, also testified, among other things, that:

"There are different botanists who have seen the different forms of the plant and have given it different names, so far as its identity is concerned. For instance, the plant in India was very excellently described by Lamark in 1788 under the name of 'cannabis sativa.' [sic (indicia)]. That was the name they gave to India hemp in the primitive days and down to comparatively recent time. Until I got some seed from India and grew them I had supposed that was a different species. I grew them in comparison with the Kentucky hemp with which you are all familiar, but in a year or two they were just alike. There was no specific difference. So it is with the other forms that have been described as different species. So there is only one species known as hemp."

From the hearing before a Subcommittee of the Committee on Finance, U. S. Senate, 75th Cong. 1st Sess. (H.R. 6906), the following appears:

"As used in the bill (H.R. 6906) the term 'marihuana' is synonymous with true hemp, the scientific name of which is cannabis sativa L. The chemical substance found in hemp which produces the narcotic effect has been officially termed 'cannabis indica,' and is known throughout the world as cannabis indica. Since botanists now recognize hemp as consisting of only one specie, the term 'indica' should be discontinued; thus in referring to hemp in a narcotic sense, the term 'cannabis' is most appropriate and more universally understood. (Matt Rens, Rens Hemp Co., Brandon, Wisc.) *supra*, p. 23."

In short, it is manifest that at the time of the enactment of 21 U.S.C. § 176a and 26 U.S.C. § 4761, Congress not only meant to but actually did include Cannabis indica in using the

term "Cannabis sativa L."[5] The question here is not one of substituting the court's interpretation or construction of a statute to vary the clear meaning of the words as suggested by the defendants, citing Helvering v. City Bank Farmers, 296 U.S. 85, 56 S.Ct. 70, 80 L.Ed. 62 (1935); Fisher Flouring Mills Co. v. United States, 270 F.2d 27 (9th Cir. 1958). On the contrary, although the phrase is a botanical one, it is a phrase whose meaning was clearly understood by Congress at the time of the enactment of the statute. This appears from the legislative history and the testimony adduced before this court. At the time of the enactment of the statute there was no doubt as to what the term "Cannabis sativa L." meant, according to the consensus of botanical opinion.

Accordingly, this court rejects the defendants' offer of proof and will exclude the introduction of any expert testimony before the jury concerning the mono- or polytypic nature of Cannabis sativa L. This is wholly consistent with prior judicial adjudications. See Leary v. United States, 395 U.S. 6, 50, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); United States v. Moore, 330 F.Supp. 684 (E.D.Pa.1970), aff'd, 446 F.2d 448 (3d Cir. 1971); United States v. Adams, 293 F.Supp. 776 (S.D.N.Y.1968).

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5. See Hearings before the Committee on Ways and Means. House of Representatives, 75th Cong. 1st Sess. (H.R. 6385); Hearings before a Subcommittee of the Committee on Finance, U.S. Senate, 75th Cong. 1st Sess. (H.R. 6906). In 1956 when Section 176a or Title 21, U.S. Code was enacted, neither the legal nor botanical meaning of the term had changed.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-77

MITCHELL ROTHBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Cannabis he possessed (Cannabis indica Lam.) is a different species of Cannabis from that identified in the statutory definition of marihuana (Cannabis sativa L.).

Petitioner, indicted in the United States District Court for the Eastern District of New York on seven counts of having unlawfully transported, concealed and sold hashish, in violation of 21 U.S.C. (1964 ed.) 176a, pleaded guilty to one count charging him with facilitating the transportation of 472 pounds of hashish. He was sentenced to imprisonment for a term of five years.

In a hearing prior to the guilty plea, petitioner made an offer of proof that Cannabis sativa L., the descriptive term for marihuana used by the definitional statute (26 U.S.C. (1964 ed.) 4761(2)), to which 21 U.S.C. 176a

refers, is only one of two or more botanical species of the genus Cannabis and that he had possessed Cannabis indica Lam., a separate species of Cannabis. In consequence, he claimed he could not be convicted of having violated the statute under which he was charged. The district court rejected the offer of proof (Pet. App. B, 351 F. Supp. 1115). The issue was preserved for appeal with the government's consent and the court of appeals affirmed (Pet. App. A).

Petitioner's contentions are fully answered in the opinions of the two courts below, upon which we rely. As the court of appeals pointed out, from the time of the enactment of 21 U.S.C. 176 and 26 U.S.C. 4761 to the time of the offense for which petitioner was charged, it was the shared belief of "lawmakers, the general public and overwhelming scientific opinion" that there was only one species of marihuana (Pet. App. A, p. A-4). It was the intent of Congress to outlaw this species. The use of the term "Cannabis indica" in 21 U.S.C. 209 (Act of March 3, 1915, 38 Stat. 820) did not reflect a contrary view, but only the tendency to refer to the same drug by different names (see Pet. App. B, pp. A-10—A-11). Petitioner had ample notice that his conduct was unlawful and there is thus no merit to his claims.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

